MAR 30 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 814

ERNEST P. WILSON, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	8
Appendix	9

CITATIONS

Cases: PAGE

Blunden v. United States, 169 F. (2d) 391 .....5, 7

Hurley v. United States, 192 F. (2d) 297 .....5, 8

Krogmann v. United States, 225 F. (2d) 220 5

United States v. Seagraves, 100 F. Sup. 424 6

OTHER REFERENCES

18 U. S. C., Section 202 .....2, 3, 5, 6, 7, 8

18 U. S. C., Section 2 6

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The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on February 29, 1956.

OPINIONS BELOW

The sentence imposed by the District Court is unreported. The opinion of the Court of Appeals is not yet reported and is printed in the appendix, *infra*, p. 11.

JURISDICTION

The decision of the Court of Appeals in this case was dated and entered on February 29, 1956. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant can be convicted under Title 18 U. S. C., Section 202 of soliciting or accepting money to influence an official decision then pending or which may by law be brought before a person having authority to render a decision in his official capacity when such defendant has no authority or official capacity to render or recommend such a decision?

2. Whether a Federal Court of Appeals may sustain a conviction under Title 18 U. S. C., Section 202 because it is of the opinion that the defendant was guilty of aiding and abetting under Title 18 U. S. C., Section 2[redacted] when the indictment does not charge such offense of aiding and abetting, the defendant was not tried for such offense, the question of committing such offense was not submitted to the jury and there is no evidence to support such offense?

3. Whether the evidence of record is sufficient to sustain the action of the Court below in affirming the conviction of petitioner?

STATUTE INVOLVED

Section 202, Title 18 U. S. C. reads as follows:

"Sec. 202. Acceptance or solicitation by officer or other person.

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of

both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office or honor, trust or profit under the United States.

This section shall not apply to violations of section 213 of this title."

STATEMENT

Jurisdiction was had in this case in the United States District Court for the Eastern District of South Carolina, Columbia Division, upon an indictment charging violation of 18 U. S. C., Sections 202 and 371.

Petitioner was tried and convicted by a jury on counts 5, 6, 7, 8, 9 and 11 of the indictment. The sentence of the Court, as to all counts except the 5th, was suspended upon five years probation; on count 5 the petitioner was sentenced to serve a period of one year and to pay a fine of Two Hundred Dollars. Count 5 charged that on or about June 5, 1953, the petitioner and a co-defendant solicited and asked money from one Ken Mason for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at Fort Jackson, South Carolina.

Motion for judgment of acquittal on the ground that the facts did not warrant a conviction since the petitioner had no official authority over or official duty in connection

with the subject matter of the decision sought to be influenced was overruled. Motion for new trial on the ground that the evidence did not sustain the verdict of the jury was likewise denied.

The evidence was uncontradicted that the Adjutant General at Fort Jackson, South Carolina advised the Commanding General on matters pertaining to the regulation of the solicitation and sale of insurance to military personnel at such Post; that the Insurance Officer directly in charge of such activities was under the control of the Adjutant General; that the petitioner was Adjutant General at Fort Jackson from August 31, 1951 until January 14, 1953; and that on this date petitioner was relieved of all duties, placed on a non-duty or unassigned status to await trial by Court Martial for acts completely disconnected with this case.

It is further undisputed that from January 14, 1953 until petitioner's retirement from the Army on November 30, 1953, he had no connection with the Adjutant General's office and was totally removed from any duties that might remotely have been connected with the promulgation or enforcement of regulations pertaining to the sale of life insurance to military personnel.

In June, 1953, the petitioner was given Two Thousand Five Hundred Dollars by one Ken Mason who thought petitioner was Colonel Russell, the then Adjutant General of Fort Jackson. Later when Mason discovered that the person to whom he had given this sum of money was not Colonel Russell, criminal proceedings were brought against petitioner and his co-defendant.

Petitioner's co-defendant plead guilty to all counts of the indictment. Petitioner was convicted under counts 5, 6, 7, 8 and 9 with having solicited and accepted money to

influence the relaxing of the Post regulations regarding the solicitation and sale of life insurance to military personnel.

After petitioner's motion for a new trial in the District Court was denied, he appealed to the United States Court of Appeals for the Fourth Circuit which affirmed the judgment of the District Court.

No question is raised herein concerning petitioner's conviction under count 11 charging conspiracy under Title 18 U. S. C., Section 371.

REASONS FOR GRANTING THE WRIT

1. **Existing conflict among the circuits on the issues presented:** The primary issue in this case is whether an officer of the United States Army in an unassigned status with no official duties to perform and having no authority to render any official decision can be convicted under Title 18 U. S. C., Section 202 of soliciting or accepting money to influence an official decision then pending or which may by law be brought before an officer in his official capacity.

On this issue clearly there is an existing conflict among the circuits. This conflict was conceded by the Court below (Appendix, *infra*, P. 17) when the court stated:

> "It might be noted that in only one of the cases cited by Wilson's counsel, *Blunden v. United States*, 169 F. (2d) 991, was the conviction of bribery reversed, and, as to that case, we said in *Hurley v. United States*, 192 F. (2d) 297, 300: 'We are not unmindful of *Blunden v. United States*, 6 Cir., 169 F. (2d) 991, but insofar as that Decision is in conflict with our decision here, we think it incorrect.'"

Also in conflict with the decision of the Court below are the following:

Zambroni v. United States (C. A., 6), 170 F. (2d) 272;

Krogmann v. United States (C. A., 6), 225 F. (2d) 220;

United States v. Seagraves (U. S., D. C. for Guam), 100 F. Sup. 424.

The allowance of the petition in the instant case would afford this Court the opportunity to review the problems involved herein in their entirety and resolve the existing conflicts among the circuits.

2. **The Court below was in error in predicating its affirmance of petitioner's conviction upon its opinion that petitioner was guilty of aiding and abetting under Title 18 U. S. C., Section 2:** It is interesting to note the language of the Court below wherein in sustaining the conviction of petitioner it stated in its opinion as follows (Appendix, *infra,* P. 18):

> "We think Wilson could clearly be guilty under this statute, even if it were held that he could not be convicted as the primary offender under 18 U. S. C. A., Section 202. * * *
>
> There is more than ample evidence in the record to prove that Wilson aided and abetted Dean in committing bribery and that Dean was fully capable of committing this crime under a strict interpretation of 18 U. S. C. A., Section 202."

Of course, it is clear from the record that the indictment did not charge petitioner with the offense of aiding and abetting, he was not tried for such offense, the question of committing such offense by petitioner was not submitted to the jury and there is no evidence of such offense.

We, therefore, believe that if the petitioner was not guilty of violating Title 18 U. S. C., Section 202, the mere fact that the Court below was of the opinion that he was guilty of a violation of Title 18 U. S. C., Section 2 cannot afford a basis for the petitioner's conviction herein.

3. **The action of the court below in affirming the conviction of petitioner is without support in the record:** The Court below predicated its decision upon its finding that

it is immaterial whether the petitioner may not have had actual authority to carry out his commitments under the bribery scheme. The view expressed by the court below that the petitioner, while no longer directly in the chain of supervision of the regulation of insurance sales, was free and able to make any recommendation he might see fit to make to the Commanding General is unrealistic. At the times in question, the petitioner had been convicted by Court Martial and had been relieved of all active duties. It is inconceivable that the Commanding General could or would have been influenced in the slightest by an officer under such a cloud and occupying such a status.

The basis of the crime of bribery, as defined in 18 U. S. C., Section 202, is the existence of a decision pending before the bribee in his official capacity, or the existence of a decision that might lawfully be brought before him in his official capacity. The influencing of such a decision is the object of the passage of money. In this case there was no decision pending; no decision could have been lawfully made by the petitioner and the petitioner did not in fact receive the money for the purpose of influencing any decision. The petitioner here misrepresented his identity to the bribor. While this action was reprehensible and does constitute an offense other than the offense for which petitioner was convicted, the misrepresentation of his identity is further evidence that the bribor knew that the petitioner himself had no authority to make or influence a decision and for this reason intended to bribe the person who actually had such authority.

As the Court of Appeals for the Sixth Circuit stated in *Blunden et al. v. United States, supra,* p. 994:

> "To the same effect is *Browne v. United States,* 6 Cir., 290 F. 870, and *Cohen v. United States,* 6 Cir., 294 F. 488, which two cases also held that in order for the offense to exist under the statute it was necessary

that the person offering the bribe believe that the employee had the necessary authority and also **that the employee possess the actual authority to act or assist in the matter.** * * *'' (Emphasis added.)

The Court below, following its decision in the case of *Hurley v. United States,* 192 F. (2d) 297, construing Section 201 of Title 18 U. S. C., rejected the rule established by the Court of Appeals for the 6th Circuit and held that the bribor was guilty if it were shown that the bribee was an officer of the United States and that the bribe was given with the intent to influence him to commit or aid in committing any fraud on the United States or with the intent to induce him to do or commit any act in violation of his lawful duty. The court thus held that under Section 201 the bribor could be guilty of the crime of bribery regardless of whether the bribee was acting in his official capacity. However, the court below in the instant case disregarded the language of Section 202 of 18 U. S. C. and sought to impose upon the petitioner the broader language used in Section 201.

It is submitted that the Court below in affirming the District Court and holding that the petitioner violated 18 U. S. C. Section 202, despite his lack of authority or duties in connection with the subject matter of the bribe, improperly extended the language of the statute.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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